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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1960

No. 48

(No. 756—October Term, 1959)

SYSTEM FEDERATION No. 91, RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO, ET AL., ... Petitioners,

versus

O. V. WRIGHT, ET AL., ... Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR RESPONDENT, LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

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I. OPINIONS BELOW.

The Opinions below of the United States District Court for the Western District of Kentucky and the United States Court of Appeals for the Sixth Circuit are correctly reported in Petitioners' brief.

The unreported "Judgment, Decree and Injunction —Entered December 7, 1945", modification of which is sought herein, appears at page 36 of the record herein.

II. JURISDICTION OF THE COURT.

Jurisdiction of this Court is correctly stated in the Petitioners' brief.

III. STATUTES INVOLVED.

45 U. S. C., Sec. 152, Third, Fourth, Fifth, Eighth, Ninth and Eleventh (44 Stat. 577, 48 Stat. 1186, 62 Stat. 909, 64 Stat. 1238), being parts of Section 2 of the Railway Labor Act. Subsection Eleventh is quoted verbatim in Petitioners' brief (pp. 2-4). Subsections Third, Fourth, Fifth, Eighth, and Ninth are set forth in the Appendix hereof.

IV. COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW.

A. Were the District Court and the Court of Appeals for the Sixth Circuit correct in following the rule concerning the showing required of the moving party as set forth by this Court in *United States* v. *Swift & Company,* 286 U. S. 106?

B. Did the District Court abuse its discretion in refusing to modify the injunction when the Unions, the moving party, failed to make, as required by *United States* v. *Swift & Company,* 286 U. S. 106, a clear showing of extreme hardship such as to justify a finding that the Unions were victims of oppression or grievous wrong?

C. Since there was no change in the factual situation justifying a modification of the injunction, does the mere change of the law made by the 1951 Amendment to the Railway Labor Act (45 U. S. C., Sec. 152, Eleventh) compel the modification sought, particularly where, as here, the injunction was based upon an agreement of the parties that the prohibition of the union shop was to have prospective application?

D. Was the motion to modify the injunction, on the sole ground of change of law, properly denied where the uncontradicted proof establishes that the moving party has unclean hands?

V. COUNTER-STATEMENT OF THE FACTS.

In order to give the Court the proper baekground in this case, it will be necessary to state the facts concerning this litigation from its inception in 1945.

On July 16, 1945, the plaintiffs, employees located at various points on the Louisville and Nashville Railroad, brought an action against System Federation No. 91, Railway Employes' Department, American Federation of Labor, a group of affiliated international and local labor organizations, various officers of the local labor organizations and the Louisville and Nashville Railroad Company (R. 15-18).

The complaint alleged (R. 18-32) that the defendants had consistently violated the purpose, terms and provisions of the Railway Labor Act by hostile discrimination against the members of the different crafts

who were not members of the Unions and their locals, for the purpose of giving preference to members of the different crafts who were members of the Unions. It was alleged that said defendants followed towards the members of the crafts who were not members of the Unions a policy calculated to limit the freedom of association among said employees and to force them into joining the Unions, putting into effect a virtual "closed shop." It was alleged, further (R. 22-27), that the Unions and the Railroad had violated the Railway Labor Act in denying to the employees who did not belong to the Unions, among other things, (1) the right to bid on vacancies, (2) the right to promotion to higher jobs or preferred jobs, and (3) the right to work overtime at punitive rates of pay.

There were twenty-eight original plaintiffs (R. 15). They sought to recover damages in the sum of $5,000 each, and, for themselves and the classes they represented, they alleged (R. 24-32) that they would continue to suffer irreparable injury unless the Court granted the relief requested. Summarily stated, the plaintiffs prayed for:

> (1) A declaratory judgment, binding on all of the parties, settling and declaring the rights, interests and legal relations of the respective parties (R. 32-34);
>
> (2) An injunction to protect and enforce such rights and obligations as might be declared (R. 34-35); and
>
> (3) Judgment awarding each of the plaintiffs the sum of $5,000 (R. 35).

After the complaint was filed and some discovery depositions were taken by the Unions and the Railroad, a complete settlement of the case was agreed upon between the plaintiffs, the Union defendants and the Railroad defendant. Under date of December 1, 1945, the Union defendants, and the officers thereof, and the Railroad defendant took a comprehensive release from the plaintiffs (R. 138-144). The release recited that "it is the mutual desire of all of the parties to said action to settle and dispose of all issues in dispute among them in the following manner" (R. 138). It then listed three things which were to be done, and the first was "The entering of a consent decree in the aforesaid action . . ., a copy of which consent decree is attached hereto" (R. 138). Following such recitals, the release provided that "in consideration of the sum of $5,000.00 this day paid to the undersigned by the defendants . . . and the consent of said defendants to the entry of a decree in said action, a copy of which is attached hereto", the plaintiffs executed the said release (R. 139).

Pursuant to the terms of the release, on December 7, 1945, the consent decree styled "Judgment, Decree and Injunction" was entered by the District Court (R. 36-39). The first sentence of this "Judgment, Decree and Injunction", hereinafter to be referred to as "consent decree", discloses that it was "by consent and agreement of all parties to this action." It ordered, adjudged and decreed as follows:

(1) That the Unions are under the obligation and duty to represent and treat fairly and impartially, and without discrimination based on membership or non-membership in any labor organization, all members of the crafts or classes, including plaintiffs, without regard to whether said employees are members or retain their membership in the Unions (R. 36);

(2) That the Railroad is under the obligation and duty to refrain from discrimination against its employees in the crafts or classes, including the plaintiffs, because of the failure or refusal of said employees to join or retain their membership in any of the Unions (R. 36-37);

(3) That the plaintiffs and all other employees of the Railroad in the crafts or classes involved who are not members of the Unions shall, in accordance with the collective bargaining agreements, be entitled, irrespective of and without regard to whether they join or retain membership in the Unions, to the rights of promotion, the proper protection of seniority, the right to bid on and be assigned to vacancies, the right to leaves of absence with proper protection of seniority, and the right to a proper share of overtime work, as provided for in such agreements then in effect or that may thereafter be in effect in accordance with the Railway Labor Act (R. 37);

(4) That all of the defendants be enjoined from requiring the plaintiffs, and the classes represented by them, to join or retain their membership in the Unions as a condition to receiving promotion, leaves of absence, proper protection of seniority, overtime work and other rights or bene-

fits which may arise out of or be in accordance with regularly adopted bargaining agreements then in effect or that might thereafter be in effect (R. 37-38); and

(5) That the defendants be further enjoined, in the application of the provisions of the regularly adopted bargaining agreements then in effect or that might thereafter be in effect, from discriminating against the plaintiffs and the classes represented by them by reason of, or on account of, the refusal of said employees to join or retain their membership in any of the Unions (R. 38).

The judgment, decree and injunction have remained in full force and effect, and twice the Railroad and the Unions have been called upon to defend contempt citations. *System Federation No. 91* v. *Reed, et al.*, 180 F. 2d 991 (C. A. 6th); *John R. Cain* v. *System Federation No. 91, et al.*, February 27, 1946, Western District of Kentucky, Civil Action 942 (Not Reported).

A motion to modify the injunction (R. 39-43) was filed July 2, 1957, by System Federation No. 91, Railway Employes' Department, A.F.L.-C.I.O. (formerly known as System Federation No. 91, Railway Employes' Department, American Federation of Labor), and other Union defendants or their successors.

The Unions moving to modify stated (R. 42) that they and other labor organizations representing different crafts of the Railroad's employees were currently seeking to negotiate, with respect to the employees of the Railroad represented by them under the Railway Labor Act, agreements requiring the employees so rep-

resented, as a condition of their continued employment, to become and remain members of the organizations representing their respective crafts, subject to the limitations and conditions prescribed in Section 2, Eleventh, of said Act as amended (R. 42).

The Unions further alleged (R. 40) that at the time of the institution of this action, and at the time of the entry of the decree of injunction, Section 2, Fourth and Fifth, of the Railway Labor Act (45 U. S. C., Sec. 152, Fourth and Fifth) made it unlawful for carriers to interfere in any way with the organization of their employees or to coerce or compel their employees to join or remain, or not to join or remain, members of any labor organization; that such prohibitions were generally construed as creating the "open shop" in the railroad industry, and as making unlawful the closed shop or union shop, as well as other forms of compulsory union membership agreements (R. 40).

In paragraph 5 of the motion (R. 43) it was alleged that the 1951 Amendment (45 U. S. C., Sec. 152, Eleventh) to the Railway Labor Act terminated, to the extent specified therein, the employees' right to be free from the requirements of union shop agreements and that it is no longer equitable that said decree of injunction should have prospective application to prohibit the defendants from negotiating such agreements pursuant to express Congressional authorization.

The Unions' motion to modify the injunction was based solely on this change of law. They introduced no evidence on the question whether or not there had

been a change in the *factual* situation which had existed at the time of the entry of the consent decree and injunction.

The employee Respondents introduced evidence showing that even at the time of the proceeding to modify, abuse and threats of discrimination continued to be directed against employees not in complete accord with union activities and policies (R. 81-137). The abuse and threats were intensified following a strike in 1955. After this strike it was necessary for the Railroad Company to provide police protection for such employees, and even at the time of the proceeding to modify the injunction, such police protection was still necessary at some points (R. 129). The record in this case shows that if the Unions are released from the restraint of this injunction, they or their members will make every effort to deprive the non-union men of their jobs (R. 91-92). The oral evidence shows that personal hatred and violence have been practiced, and are being practiced, against non-union workers. This injunction has preserved their jobs (R. 81-137).

In this proceeding to modify the injunction, the District Court concluded (R. 77) from the history of the 1951 Amendment of the Railway Labor Act, as reflected by the proceedings in Committees of Congress and as determined by this Court in the case of *Railway Employes' Department, et al.* v. *Hanson*, 351 U. S. 225, that the union shop provisions of the Railway Labor Act are *permissive*, and that Congress has not compelled or required carriers and employees to enter into

union shop agreements. The District Court therefore concluded (R. 77-78) that the 1951 Amendment to the Act leaves the Railroad and the bargaining Unions at liberty to agree that a union shop shall not prevail. This reasoning, applied to the agreement which underlay the injunction and declaration of rights of December 7, 1945, when the Railway Labor Act forbade a union shop, forced the Court to the conclusion that the unions had not been compelled to agree (as they did freely agree at the time of the consent decree) that membership in a Union would not be required of the plaintiffs as a condition of employment in any collective bargaining agreement then in effect between the Railroad and the Unions, or in such agreements as might thereafter be in effect between the Railroad and the Unions in accordance with the Railway Labor Act.

The District Court noted (R. 78) that a reading of the agreed judgment shows that it refers not only to any collective bargaining agreement then in effect but to such future agreements as might thereafter be made between the Railroad and the bargaining Unions; that in 1945 there was no provision in the Railway Labor Act prohibiting the Railroad and the Unions from agreeing that a union shop should not obtain; and that there is no prohibition now in the Railway Labor Act prohibiting the Railroad and the bargaining Unions from agreeing that a union shop shall not prevail. Therefore, under the *Hanson* case, *supra,* the Court reasoned, if the union shop agreement is permissive, it is also permissive to agree that a union shop shall not prevail.

The District Court (R. 78-79) concluded that it has continuing authority to modify the injunction, under the doctrine of *United States* v. *Swift & Company,* 286 U. S. 106, but that the change in the Railway Labor Act in 1951 deleting the prohibition against a union shop and making it permissive does not *compel* a modification of the decree which enjoined the Railroad and the Unions from providing for a union shop in existing agreements or those to be thereafter made. The Court concluded that the standard set up in the *Swift* case for modification of an injunction had not been met, in that there was no clear showing of grievous wrong evoked by new and unforeseen conditions which should lead the Court to change what had been decreed, after extended litigation, with the consent of all concerned.

The District Court did not consider the existence or non-existence of animosity, hostility, or bitterness as decisive of the question (R. 79), but expressed an unwillingness, *in view of the circumstances proven,* to supervise the affairs of the Unions to prevent the Unions from discriminating against the present non-union employees if they were taken into the Unions (R. 79).

The District Court stated that the provisions of the Railway Labor Act (45 U. S. C., Sec. 152, Fourth and Fifth) made illegal a union shop in 1945 when the injunction was agreed upon. Hence, it was then unnecessary for the Railroad and the Unions to agree, as they did, that the non-union members should not be required to join or retain membership in any union

(R. 79). *The Court pointed out that the Railroad and Unions went further and agreed (not only between themselves but also with the non-union employees of the Railroad) that no such union membership should thereafter be required in any bargaining agreement* (R. 80).

The District Court held that the 1951 Amendment did no more than make negotiations for a union shop permissive, as was recognized in the *Hanson* case, *supra*. It stated that the Amendment did not nullify the agreement or the injunction in question, and that it did not prohibit an agreement between the Railroad and the Unions that a union shop should not exist. The Court concluded to leave the parties as they agreed to be and to remain, and, accordingly, it overruled the motion to modify (R. 80).

Upon appeal to the United States Court of Appeals for the Sixth Circuit (R. 150-152), that Court dealt realistically with the case, which had been before it on a previous occasion. It noted that this controversy had its beginning in bitter disagreements between groups of union and non-union employees arising many years ago and that "it also stems from a strike, accompanied by much violence, in 1955, in which a railroad bridge was burned, and certain employees were sentenced to prison terms, for violation of, and conspiracy to violate the Federal Train Wreck Act," 18 U. S. C., Sec. 1992. It cited *Stanley* v. *United States*, 245 F. 2d 427 (C. A. 6th), the case involving those convictions. After reciting the facts of the case at bar, the Court

of Appeals affirmed the ruling of the District Court that when the injunction was issued the parties therein, by their consent thereto, provided that no requirement of union membership should thereafter be in effect in any bargaining agreement. It agreed that the 1951 Amendment did no more than make negotiations for a union shop permissive, and did not nullify the agreement or the injunction issued. It found no error in the order of the District Court, which, *under the circumstances of the case,* left the parties as they agreed to be. The Court of Appeals affirmed for the reasons set forth in the District Court's Opinion (R. 152).

On April 18, 1960, this Court entered an Order granting certiorari (R. 153).

VI. SUMMARY OF ARGUMENT.

A motion to modify the decree made pursuant to Rule 60(b)(5) of the Federal Rules of Civil Procedure is a motion addressed to the sound discretion of the District Court.

The decree for which the modification is sought was entered by the District Court on December 7, 1945, as a result of an agreed settlement of all issues in the case by all parties to the litigation. Under the terms of the settlement, the plaintiffs released all claims for damages,[1] based upon alleged acts of hostile discrimination against them by reason of their non-union membership,

[1]The plaintiffs, in their complaint, had alleged damages to them in the total sum of $140,000.00.

in consideration of (1) an agreement, which was to and did become the judgment and decree of the Court, providing, for the *future* protection of the plaintiffs and the classes represented by them (non-union employees in the shop crafts), that union membership would not be required as a condition precedent to employment benefits under agreements *then in effect or* that *thereafter* might become effective; and (2) the payment to them of $5,000.00.

While the District Court retains power to modify the prospective effect of such a consent decree, this Court, in *United States* v. *Swift & Company,* 286 U. S. 106, held that nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead a court to change what was decreed with the consent of all concerned. The existence of such an agreement in the settlement of the aforementioned litigation, while not depriving the Court of its power to modify the decree, is nevertheless a fact to be considered in weighing the equities of the parties and in determining the proper exercise of the Court's power to modify the decree.

The Petitioners introduced no evidence. The non-union employees, for whose protection the decree was entered, made an affirmative and uncontradicted showing by testimony that there was no change in the attitude of hostility toward them by Petitioners' members; that efforts are still being made by union members to intimidate them and force them from their jobs and to cause them to be by-passed when promotions are

made and work is assigned; that such feelings of hostility against them were intensified following a strike in 1955; and that discrimination against them remains a real and present threat to their livelihood.

The Petitioners' entire case is that the 1951 Amendment to the Railway Labor Act *compels* the modification they demand, irrespective of the continued threats of discrimination and hostility, and that the District Court had no discretion to deny their motion.

The 1951 Amendment is permissive only and not mandatory. *Railway Employees' Department, A.F.L. v. Hanson,* 351 U. S. 225. The Railway Labor Act, as amended in 1951, leaves the Railroads and the Unions free to agree that a union shop shall *not* prevail and that union membership shall *not* be a condition of continued employment. The agreement of the parties was lawful when made in 1945 and remains lawful today, notwithstanding the 1951 Amendment. This change of law alone does not compel the modification sought.

The only "grievous" wrong claimed by petitioners is the failure of the Unions to derive income from non-union members. This income could be obtained by them only by the establishment of a union shop, in which event what would remain of the injunction, after the modification, would be a decree purporting to protect the rights of a non-existent class. The modification sought thus would thwart the basic purpose of the original decree and confirm the Unions and their members in the discrimination which the decree was designed to dispel. Petitioners' suggestion that the

decree could be so modified as to incorporate protection for all activities other than the negotiation of a union-shop contract is in reality a suggestion that a new decree be entered; for the negotiation of a union-shop agreement would destroy the class the present decree was designed to protect Such a new decree, to be effective, would require judicial supervision of the Unions' affairs, a task which the District Court properly declined to undertake in the circumstances proven.

The change of law effected by the 1951 Amendment was not unforeseen by the Petitioners. At the time of the agreed settlement in this case, in 1945, the railroad Unions, including the Unions involved in this case, already had begun urging the change in the Railway Labor Act which became effective in 1951 permitting the negotiation of union-shop agreements.

The record here discloses that the Petitioners are seeking equitable relief with unclean hands, inasmuch as threats of hostile discrimination against the employees protected by the decree are continuing to be made.

The Petitioners failed to sustain the burden of proof imposed by the *Swift* case. Under the record made in this proceeding, the District Court did not abuse its discretion in denying the motion for modification of the consent decree.

VII. ARGUMENT.

A. The District Court and the Court of Appeals for the Sixth Circuit Were Correct in Following the Rule Concerning the Showing Required of the Moving Party as Set Forth by This Court in *United States* v. *Swift & Company*, 286 U. S. 106.

The Petitioners' motion to modify the injunction in this case was made under Rule 60(b)(5) of the Federal Rules of Civil Procedure. Rule 60(b) merely prescribes the procedure for obtaining relief. It does not purport to extend the substantive law as to the grounds for vacating judgments or decrees by going beyond the principles which have obtained in courts of equity for granting relief from judgments or decrees. The notes of the Advisory Committee on Amendment to Rules reported at 28 U. S. C. A., p. 313, reveals that the Advisory Committee stated:

> "It should be noted that rule 60(b) does not assume to define substantive law as to the grounds for vacating judgments, but merely prescribes the practice in proceedings to obtain relief."

Numerous cases have held that motions under Rule 60(b) are still addressed to the sound discretion of the trial court. *Perrin* v. *Aluminum Company of America*, 197 F. 2d 254, 255 (C. A. 9th); *Morse-Starrett Products Company* v. *Steccone*, 205 F. 2d 244, 248-249 (C. A. 9th); *Title* v. *United States*, 263 F. 2d 28 (C. A. 9th), cert. den. 359 U. S. 989, rehearing den. 360 U. S. 914, and cases cited therein.

In the case here before the Court, the District Court found as a fact that an agreement of the parties underlay the decree of December 7, 1945 (R. 78); that the agreement not only provided that the non-union members should not be required to join or maintain membership in any of their craft unions as a condition precedent to employment, but the agreement went further to provide that no such requirement of union membership should *thereafter* be in effect in *any* bargaining agreement between the Railroad and the Unions (R. 79-80).

The District Court, although recognizing the existence of the above-mentioned settlement agreement, held that it had the authority to modify the prospective application of the injunction under *United States* v. *Swift & Company,* 286 U. S. 106, and clearly recognized that the motion to modify the injunction was directed to the Court's discretion (R. 78). Further, there is no question but that the District Court followed the rule announced by the *Swift* case concerning the showing required to be made by the Petitioners to entitle them to the modification (R. 79).

This Court has pointed out clearly, in the *Swift* case, that discretion should be exercised to grant modification of a consent decree *only* where changed circumstances have caused the decree to become an instrument of grievous wrong. In the *Swift* case, this Court stated (at page 119):

> "Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions

should lead us to change what was decreed after years of litigation with the consent of all concerned."

The Petitioners also cite and rely upon the *Swift* case (Brief, pp. 15-16). Thus, there is no dispute that the principles of the *Swift* case are applicable here. But the Petitioners, although they concede that the case is applicable here, at least imply that the District Court did not follow the principles announced therein by this Court. In Petitioners' brief (pp. 9-10), it is stated:

". . . if the reasoning of the Courts below were to prevail, all consent decrees of injunction would be immune from modification, on the theory of an implied contract compelling the courts to leave the parties 'as they agreed to be and to remain'."

The District Court engaged in no such reasoning. On the contrary, it explicitly stated (R. 78):

"The Court agrees with counsel for the unions that there is continuing authority in the Court to modify the prospective application of a judgment of injunction. This is the teaching of the case of *United States* v. *Swift & Company*, 286 U. S. 106, where the Supreme Court said there was no doubt that a court of equity has power to modify an injunction in adaptation to changed conditions though the injunction was entered by consent."

The District Court thus clearly recognized its power to modify the consent decree; but it stated further (R. 78):

"There remains the question: should that power be exercised in this case?"

It is entirely clear that the District Court and the Court of Appeals correctly followed the decision of this Court in the *Swift* case. We shall also show in the subsequent sections of this brief that the District Court exercised sound discretion in overruling the Petitioners' motion.

B. The District Court Did Not Abuse Its Discretion in Refusing to Modify the Injunction When the Unions, the Moving Party, Failed to Make, as Required by *United States* v. *Swift & Company*, 286 U. S. 106, a Clear Showing of Extreme Hardship Such as to Justify a Finding That the Unions Were Victims of Oppression or Grievous Wrong.

There can be no question but that the party seeking the modification of an injunction, here the Petitioners, must carry the burden of establishing proper grounds for such modification. This principle is not only clearly established by *United States* v. *Swift & Company, supra,* but stands affirmed by this Court in the later case of *Ford Motor Company* v. *United States,* 335 U. S. 303. In the later case this Court reversed a judgment granting a modification of an injunction, stating (at page 322):

"The Government [movant] has not sustained the burden of showing good cause why a court of equity should grant relief from an undertaking well understood and carefully formulated."

Under the authorities cited, it is not open to question that the burden of proof was on the Petitioners clearly to show that inequity and grievous wrong would result from continuing the injunction in force.

The Petitioners rely upon the naked change of law made by the 1951 Amendment to the Railway Labor Act[1] (45 U. S. C., Sec. 152, Eleventh), and they introduced no evidence whatsoever on whether there had been any change in the *factual* situation existing at the time of the entry of the original decree.

The Respondent employees, on the other hand, introduced evidence which clearly shows no change in the attitude of hostility on the part of union members toward non-union employees who are entitled to the protection of this injunction (R. 81-137). This bitterness and hostility was intensified as a result of a strike on the railroad in 1955. The evidence introduced by the non-union employees is relevant and is deserving of this Court's attention in the proper disposition of this case. Their uncontradicted evidence conclusively shows that one of the purposes of the Unions or the members thereof in seeking the modification and a union shop agreement is to force the non-union man out of his job (R. 90, 91, 92, 97, 99, 106-107).

The testimony of these men, many of whom suffered abuse and indignities, does not simply illustrate some isolated instances occurring during the heat of the 1955 strike. It very realistically shows the attitude

[1]The effect of the 1951 Amendment upon the consent decree involved in this case is argued separately by this Respondent in Section "C", *infra*.

and feelings of hostility, bitterness and resentment on the part of Petitioners' members toward non-union employees who worked during the 58-day strike, and toward union employees who worked during the strike and who were either expelled from the unions or relinquished their membership therein as a result of it (R. 83, 108, 109, 117, 124, 134, 135, 136).

As stated by one witness (R. 90-92):

> "Q. Now, Simon, last December, that is December of 1957, was any remark made to you or in your presence about holding your job?
>
> A. Yes, sir, up in my locker room, since this letter has been out, they would never tell you anything, but they always talking where you could hear it, as soon as this injunction is mortified (sic), we will get all the scabs. They said that on the 2nd of January, I heard a gang of them saying the same thing, on the 2nd of January, said, as soon as this injunction is dissolved, we are going to get all the scabs."

These reprehensible indignities inflicted upon these employees were for the purpose of forcing them to relinquish their employment. Nor can the conclusion be evaded that these feelings and attitude of hostility and bitterness toward these non-union employees have continued and exist now (R. 102, 103, 118, 129). Another witness testified (R. 102):

> "Q. . . . do you think the feeling demonstrated by the actions you have told us about has been cured or whether it still exists as of today?

A. It exists today. They are very careful because at first they were not, and after some of them were apprehended and disciplined, they became very careful about it and some of them have eliminated it, but it is a definite feeling against these people, that is very strong."

It was made clear that these acts involved the shop craft employees who are members of the class concerned here with the present motion for modification, the witness further stating (R. 103):

"Q. Did these acts you described occur with respect to shop craft employees or operating employees?

A. Shop craft employees."

It is clear that this attitude of hostility toward these non-union employees still prevails (R. 102, 103, 118, 129). This is the plain import of the letter of Jake Paschall, General Chairman, Brotherhood of Locomotive Firemen and Enginemen, to certain Birmingham, Alabama lodges, dated February 6, 1958 (R. 146-147). This exhibit quotes a letter dated February 5, 1958, written by General Chairman Ray Abner of the International Brotherhood of Firemen and Oilers, one of the Petitioners here (R. 16), who refers to the "scabs" from Birmingham, some by name, "Shopmen Dave Carter, Sam Jones and Sam Durant", who Mr. Abner stated testified at the hearing on Petitioners' motion for modification on February 3, 1958. The tenor of Mr. Abner's statements, written two days after the hearing, reflects the attitude of one who is interested,

not in rectifying the threats, mistreatment and abuse, but in further kindling hostility toward these men for their even having testified about it.

As stated by the District Court (R. 79), the Unions made no attempt to rebut the testimony given as to the bitterness and hostility that exist between the employees who are union members and the non-union employees. In their brief before this Court (p. 16), the Petitioners admit that the foregoing facts (R. 81-137) are not in dispute, or *arguendo* concede them, and argue that they are nevertheless entitled to the requested modification as a matter of law. They argue (Brief, p. 14) that what would remain of the injunction would sufficiently protect the employees against hostile discrimination. The Petitioners' position is remarkable for its boldness and is an affront to the conscience of a court sitting in equity. But passing that point for the moment,[1] we call attention to the fact that the District Court thus effectively answered this argument of Petitioners (R. 79):

> "Counsel for the unions insist that any threat of reprisal from that source could be avoided by suitable provision in the judgment or order of modification in addition to the safeguard provided in the 1951 Amendment to the Railway Labor Act. *The circumstances proven do not convince the Court that such supervision of the conduct of a union of its affairs among its own membership, as such a provision might entail, should be undertaken.*" (Emphasis added.)

[1] This is dealt with at pp. 51-54, *infra*.

This Court, in *United States* v. *Swift & Company, supra,* stated (at page 119):

> "The difficulty of ferreting out these evils and repressing them when discovered supplies *an additional reason why we should leave the defendants where we find them, especially since the place where we find them is the one where they agreed to be.*" (Emphasis added.)

The Petitioners have made no showing that they are victims of oppression or grievous wrong. In the face of the uncontradicted facts showing the abuse and continuing threats of discrimination toward the non-union employees, the Unions make the untenable argument (Brief, p. 28) that equity *compels* the modification sought; otherwise, they contend, they are *deprived of income* by a continuation of the injunction. So long as the non-union employees remain the victims of such oppression and hostility affecting their very livelihood as the record of this case shows, the Unions' claim of loss of income, under the facts and circumstances of this case, is one completely without weight on the scales of equity. This Court, in *United States* v. *Swift & Company, supra,* also stated (at pages 117-118):

> ". . . The question is not whether a modification as to groceries can be made without prejudice to the interests of producers of cattle on the hoof. *The question is whether it can be made without prejudice to the interests of the classes whom this particular restraint was intended to protect.*"
>
> . . . . . .

". . . No doubt the defendants will be better off if the injunction is relaxed, but they are not suffering hardship so extreme and unexpected as to justify us in saying that they are the victims of oppression," (Emphasis added.)

This claim of the Unions, that the grievous wrong done to them by a continuation of the present injunction consists of a deprivation of income from the employees who are not members of the Union, points unerringly, we submit, to the real object of the requested modification. The additional income could only be obtained by the Unions by the establishment of a union shop in their crafts, *in which event the class of non-union employees for whose protection the injunction was sought and entered would be obliterated. What would then remain of the injunction would be a decree purporting to protect the rights of a non-existent class.* Thus, it is apparent that the real effect of granting the modification sought would be to vacate the entire decree—it would thwart the basic purpose of the original decree and confirm the Unions and their members in the discrimination which the injunction was intended to dispel.

In *United States* v. *Radio Corporation of America, et al.*, 46 F. Supp. 654 (D., Del.), the Court, speaking of modification of an injunction, stated:

"It would seem, however, that such modification must be consistent with the purpose of the original decrees and calculated to effectuate and not thwart their basic purpose. *United States* v. *International Harvester Co.*, 274 U. S. 693, 702,

47 S. Ct. 748, 71 L. Ed. 1302; *Chrysler Corporation* v. *United States*, 316 U. S. 556, 62 S. Ct. 1146, 86 L. Ed. . . ."

Thus, before modification may be made, it must be shown that such modification would serve to effectuate rather than thwart the basic purpose of the original decree. Please see also *Walling* v. *Harnischfeger Corporation*, 142 F. Supp. 202, 204 (E.D., Wis.); *United States* v. *Besser Manufacturing Company*, 125 F. Supp. 710 (E.D., Mich.); and *Morse-Starrett Products Company* v. *Steccone*, 205 F. 2d 244 (C.A. 9th).

Furthermore, the Unions were a party to the agreed settlement in this case and entered into an agreement by which they may well have saved a substantial sum by reason of the non-union employees' relinquishment of their claims for damages resulting from claimed discrimination over a period of several years. Wisely or unwisely, the Unions submitted to these restraints.

Petitioners argue (Brief, p. 27, n. 6) that "none of the acts complained of or conduct enjoined could be consummated without its [the Railroad's] collaboration"; that "hirings, firings, promotions, exercise of seniority rights, assignment of overtime work, etc., are necessarily administered by the employer, not the Union." The Petitioners question the right of the Railroad to be heard at all in opposition to the proposed modification (Brief, p. 27).

Even though this Respondent is subject to the restraints of the injunction, there can be no question that the impetus of the discrimination against *non-*

union employees was provided by the Unions. This entire controversy arose, not because *Union* employees were the subject of discrimination, but because *non-union* employees were the victims of hostile discrimination. It is specious and untenable for counsel to imply that the Railroad has been the instigator of the discrimination and that the Unions are merely innocent victims entangled in a web of circumstances. The entire tenor of this litigation from its inception refutes such implied accusations. Furthermore, as illustrative of the situation, reference is made to Rule 11 of the Agreement effective September 1, 1943, between the Railroad and its employees represented by these Unions:[1]

"RULE 11. DISTRIBUTION OF OVERTIME.

"11(a) When it becomes necessary for employes to work overtime they shall not be laid off during regular working hours to equalize the time.

"11(b) Overtime will be distributed as equally as possible among the different classes of employes of each department or sub-department as far as the character of work will permit.

"11(c) Record will be kept of overtime worked in order to distribute the overtime as equally as possible.

[1]Rule 11 is the rule referred to in paragraph 1.8 of the original complaint herein (R. 22-23). Paragraph 1.8 of the complaint does not set out the rule verbatim, but the rule is a part of the record in this case, being a part of Exhibit D to the Railroad's original answer herein. That exhibit is, of course, available to the Court if it wishes to call for the full record below. Rule 11 has been renumbered as Rule 12 in the collective bargaining agreement currently in effect between the Railroad and its employees represented by these unions.

"NOTE: This rule refers only to work performed outside of regularly assigned hours at punitive rate of pay. Overtime-call lists shall be drawn up by mutual agreement between the officer in charge and the committee."

The "committee" referred to in the above Rule consists of Union representatives whose responsibility for proper distribution of overtime work was and is no less than that of the Railroad's. It is not difficult to envision the problem encountered by the Railroad in dealing with a "committee" of Union members determined to favor other members of the Union in the assignment of overtime at the punitive rate of pay. The Railroad does not complain of an injunction that insures that there will be no hostile discrimination in applying the Rule.

The Railroad has a real and direct interest in this case in that its employees are involved. At the present time (R. 129) it is necessary for the Railroad to maintain special police at various points on its system because of the danger of non-union men being harmed on their way to and from work. The Railroad (R. 129-130) has received petitions from over 2,000 employees and cards from 800 shop-craft men protesting any change in this injunction. The record in this case is replete with evidence of efforts of the Unions or their members, by means of force and violence, to frighten non-union men from the job (R. 90, 91, 92, 97, 99, 106-107). Efforts are still being made by the Unions to force the Company to by-pass non-union men when promotions are made (R. 114-117) and work

is assigned (R. 117, 118, 119, 120). Such conduct as this affects the day-by-day operation of the Railroad and its ability to render the service it is required to perform by law.

Secondly, the Railroad was a party in good faith to the agreed settlement of this case and it has endeavored to keep its agreement. It has an interest in seeing that the Unions also abide by the agreement. In the District Court the Railroad opposed the modification of the injunction by motion (R. 44-46) and response (R. 51-56).

Accordingly, there is no substance in Petitioners' contention, the Railroad being a party to the action and having a real and substantial interest in it. *Bennett* v. *Langworthy,* 49 F. 2d 574, 575 (C. A. 8th).

The Petitioners contend (Brief, p. 11) that the effect of the denial of the requested modification is to maintain an everlasting prohibition against a union-shop agreement and to perpetuate a restraint against conduct now lawful. Such a contention discloses a misunderstanding by the Petitioners of the decisions below, and is tantamount to an admission by the Unions that they will perpetually practice abuse and discrimination. The decisions of the Courts below are simply to the effect that *upon the present record* a modification of the injunction should not be granted. The Unions did not introduce any evidence, and the reason they did not do so must have been that they well knew that animosity and bad faith towards the non-union workers still exist.

Under the authorities we have cited, it is clear that the burden of proof was on the Petitioners to show that inequity and grievous wrong would result from continuing the injunction in force. No change in the factual situation having been shown—indeed, it having been shown that present conditions are, if anything, worse than those which obtained at the time the injunction was agreed upon—there was no justification for any modification of the injunction.

C. Since There Was No Change in the Factual Situation Justifying a Modification of the Injunction, the Change of the Law Made by the 1951 Amendment to the Railway Labor Act (45 U. S. C., Sec. 152, Eleventh) Does Not Compel the Modification Sought, Particularly Where, as Here, the Injunction Was Based Upon an Agreement of the Parties That the Prohibition of the Union Shop Was To Have Prospective Application.

The Petitioners' entire case is that the 1951 Amendment to the Railway Labor Act *compels* the modification sought, as a matter of law, and that, regardless of an affirmative showing of continued hostility and threats of discrimination toward those non-union employees subject to the protection of the decree, the District Court had no discretion to deny the modification sought.

We need not argue the broad and abstract proposition whether a change of law is ever sufficient to authorize the suspension or modification of an injunction previously granted. *The question here is much narrower and involves a determination whether a specific*

change of law, namely, the 1951 Amendment to the Railway Labor Act, alone, and under the facts and circumstances of this case, compels the modification demanded by the Petitioners. Earlier portions of this brief have presented some of the facts and circumstances of this case. Others remain to be considered.

The existence of the agreement between the parties is a fact which cannot be ignored in weighing the equities of the parties.

The Petitioners argue (Brief, p. 23, n. 5) that there is no agreement involved in this case and that all they did was simply to indicate their approval on the consent decree. The Petitioners were parties to the agreed settlement of this case with the non-union employees, as surely as was the Railroad.

There can be no question concerning what occurred in 1945. A complete settlement of all issues in this case was agreed upon between the plaintiffs, the Union defendants and the Railroad defendant. Under date of December 1, 1945, the Union defendants, and the officers thereof, and the Railroad defendant, took a comprehensive release from the plaintiffs (R. 138-144). The release recited that "it is the mutual desire of all of the parties to said action to settle and dispose of all issues in dispute among them in the following manner" (R. 138). The release enumerated three things that were to be done, the *first* one being: "The entering of a consent decree in the aforesaid action . . . , a copy of which consent decree is attached hereto" (R. 138). Following such recitals, the release provided that "in consideration of the sum of $5,000 this day

paid to the undersigned by the defendants . . . and the consent of said defendants to the entry of a decree in said action, a copy of which is attached hereto", the plaintiffs executed the said release (R. 139). Pursuant to the terms of the release, the said decree, the first sentence of which discloses that it was "by consent and agreement of all parties to this action", was entered by the District Court on December 7, 1945, six days *after* the date of the release.

It is clear that the parties settled the entire controversy by providing, for the future protection of plaintiffs and the classes represented by them (non-union employees in the shop crafts), that Union membership would not be required as a condition precedent to employment benefits; and by providing, for the vindication of their rights in the past, that the relatively small monetary consideration recited should be paid.

At the time of the settlement of this case, in 1945, the National Labor Relations Act, applicable to other industries, permitted closed-shop contracts (Section 8(a)(3), National Labor Relations Act, 29 U. S. C. Sec. 158(a)(3)). Moreover, prior to 1945, the Railroad Unions, including the Petitioners, had begun exerting efforts to get the Railway Labor Act amended so as to provide for a union shop. This is disclosed by Presidential Orders, as well as the history and background of the Amendment, of which this Court can take judicial notice. *Dennis* v. *United States,* 339 U. S. 162, 169; *Bowles* v. *United States,* 319 U. S. 33, 35; 20 *Am. Jur.;* Evidence, Sec. 44, page 67.

Attention is especially invited to the Transcript of the Proceedings of the National Railway Labor Panel Emergency Board, Chicago, Illinois, 1943, Book II. On September 25, 1942, notices were served by the Unions on the railroads, including the Louisville and Nashville Railroad, demanding a union shop (Book II, page 2106). The railroads declined the demand on the ground that the existing Act prohibited union shops (45 U. S. C. Sec. 152, Fourth and Fifth). In order to resolve this issue along with demands for wage increases, the President, pursuant to 45 U. S. C. Sec. 160, created an Emergency Board and referred the matter to it. In the briefs filed with the Board, the Unions argued that there was nothing in the Railway Labor Act which prevented the Emergency Board from recommending that the Act itself be amended to provide for a union shop if such a procedure appeared to be the most feasible method of settling a dispute (Book II, pages 1979-1980, *supra*). They also urged that the emergency war powers of the President were such that by executive order or otherwise a union shop could be established in the industry (Book II, pages 1972-1976, *supra*). However, the Emergency Board and the President refused to accede to the Unions' demands.

Thus, when the consent decree was entered herein, the Unions had already begun urging a change in the law. Hence, the prospective language used (R. 36-38): ". . . and they [the Railroad Company and the Unions] are further enjoined, in the application of the provisions of the regularly adopted bargaining agreements in effect between the defendant Railroad and the

defendant Unions, or that may be hereafter in effect between the defendant Railroad and the defendant Unions in accordance with the provisions of the Railway Labor Act, from discriminating against the plaintiffs and the classes represented by them in this action by reason of or on account of the refusal of said employees to join or retain their membership in any of defendant labor organizations, or any labor organization." The parties unquestionably had in mind future contracts, and they negotiated in such a manner that the consent decree would be effective as to such future contracts. The wording of the agreed decree manifested the clear intent of the parties that the non-union membership provision was to have prospective effect.

In arguing against the existence of any agreement, the Petitioners contend (Brief, pp. 11, 24, 25) that if the injunction in this case is based upon an agreement, and not the Railway Labor Act, the Court would have lacked jurisdiction to issue it under the Norris-LaGuardia Act. They rely upon *Graham* v. *Brotherhood of L. F. & E.*, 338 U. S. 232.

The complaint in this case was predicated upon hostile discrimination prohibited by the Railway Labor Act, and because of such prohibition the Court had jurisdiction to issue the decree notwithstanding the Norris-LaGuardia Act. We have not contended and do not now contend that the Court's jurisdiction was conferred by consent of the parties. The injunction was not issued because the Act did or did not permit the adoption of the union shop, but because the Act requires that all employees, union and non-union, be

treated without hostile discrimination. *Steele* v. *Louisville & N. R. Co.*, 323 U. S. 192; *Virginian Ry. Co.* v. *System Federation No. 40*, 300 U. S. 515.

The District Court (R. 77-78, 79-80) and the Court of Appeals (R. 152) found as a fact that such an agreement existed. Petitioners argue (Brief pp. 23, 24) that the Court's recognition of the agreement is a rejection of the ruling in *United States* v. *Swift & Company, supra*, that a consent decree can be modified. This is not correct. Both the District Court (R. 78) and the Court of Appeals (R. 152) explicity recognized the power to modify.

While the *Swift* case teaches that the Court retains the power to modify a consent decree, it also clearly reveals that the fact that an agreement was made is not to be disregarded in weighing the equities involved and in determining the proper exercise of that power. In the *Swift* case, this Court reversed the lower court, which had granted the modification. This Court, in *Swift*, recognized an agreement, and though holding that the decree remained subject to the power of the court to modify, the Court attached considerable importance to the fact that the decree was a consent decree. This Court's opinion in *Swift* is replete with references to the fact that the parties agreed and consented to the decree. The following quotations are illustrative:

> "We do not turn aside to inquire whether some of these restraints upon separate as distinguished from joint action could have been opposed with success if the defendants had offered opposition.

Instead, they chose to consent, and the injunction, right or wrong, became the judgment of the court." (pp. 116-117) (Emphasis added.)

* * * * * * *

"Its restraints, whether just or excessive, were born of that fear. The difficulty of ferreting out these evils and repressing them when discovered supplies an additional reason why *we should leave the defendants where we find them, especially since the place where we find them is the one where they agreed to be.*" (pp. 118-119) (Emphasis added.)

* * * * * * *

"Wisely or unwisely, they submitted to these restraints upon the exercise of powers that would normally be theirs. They chose to renounce what they might otherwise have claimed and the *decree of a court confirmed the renunciation and placed it beyond recall.*" (p. 119) (Emphasis added.)

The District Court and the Court of Appeals were correct in recognizing that the Unions, the Railroad and the non-union employees were all parties to a settlement agreement providing that the non-union employees of the crafts involved in this litigation would not be required to maintain union membership, under any collective bargaining agreement then in effect or that might thereafter be in effect between the Unions and the Railroad, as a condition precedent to employment.

The existence of such settlement agreement is a fact and must be considered along with the other facts and circumstances in this case in weighing the equities involved and in determining the proper exercise of the

Court's power to modify the decree. It was so considered by the District Court, and that Court, after weighing that fact and the other facts of the case, concluded that the injunction should not be disturbed. Its conclusion, made in the exercise of a sound discretion, should be respected by this Court.

The 1951 Amendment to the Railway Labor Act (45 U. S. C. Sec. 152, Eleventh) merely grants *permission* to the Carriers and the Unions to adopt a union shop if they so desire: The provisions of this amendment were not intended to be mandatory. Petitioners (Brief, pp. 21, 22) place much emphasis on the words "shall be permitted" in the amendment. The background and legislative history of this amendment reveal that these words were intended to be permissive only.

Prior to the adoption of the 1951 Amendment, the Railway Labor Act, as amended in 1934, 45 U. S. C. Sec. 152, Fourth and Fifth, contained prohibitions against any carrier interfering with the organization of its employees or with the right of an employee to join a labor organization of his choice. The carrier was prohibited from requiring any employee to agree to join or not to join a labor organization.

In 1951, Congress yielded to the pressure long exerted by the Unions and enacted Section 2, Eleventh of the Railway Labor Act, 45 U. S. C. Sec. 152, Eleventh, granting *permission* to the Unions to negotiate with the Carriers for the adoption of a union shop. In the report of the Senate Committee which conducted hearings on this Bill, the following view was expressed

by proponents of the Bill (Vol. 2, *U. S. Code Congressional Service, 1950,* pages 4319, 4320):

> *"The bill would not require the execution of union shop agreements;* it merely permits the carriers and the representatives of their employees, through the voluntary process of collective bargaining, to include the union-shop provisions in their collective-bargaining agreements." (Emphasis added.)

Senator Hill expressed the same viewpoint in managing the Bill on the Senate floor, where he stated as follows (*Cong. Rec.,* Vol. 96, p. 15882):

> "I should like to emphasize that the bill *would not require and does not in any way make mandatory the execution of union-shop agreements;* it merely permits the carriers and the representatives of their employees, through the voluntary process of collective bargaining, to include a union-shop provision in their collective bargaining agreements." (Emphasis added.)

Again, in the same Volume of the Congressional Record, Senator Hill stated at page 16262:

> "The provisions of the bill are merely permissive. They do not require any railroad or labor organization to sign a contract. It makes it permissive for management and labor to sit around the bargaining table and, if they can work out an agreement, it is lawful for them to enter into it."

In the same Volume of the Congressional Record, Senator Pepper of Florida, at page 16373 also stated that the union shop was permissive:

> "By the very language of the bill, railroad labor and management will be permitted to negotiate for a union shop. There is no compulsion in the bill for management and labor to do so. *Management will be able amply to protect itself through free, voluntary bargaining on the subject.*" (Emphasis added.)

Perhaps the clearest expression is the statement by Representative Sullivan which appears in the same Volume of the Congressional Record at page 17057:

> "We are being asked to permit unions and management to make agreements regarding the union shop. *We are not being asked to vest in some Government board the authority to order union-shop agreements.* We are not being asked to set up some new authority at great expense to the Government *to administer some standards that will be set here.* We are simply proposing to say to railroad management and railroad labo —*'If you fellows can get together on contracts of this sort and want to sign one it is all right.'*" (Emphasis added.)

Representative Wolverton thought the same thing when he stated in the Congressional Record, same Volume, page 17050, as follows:

> *"We are not being asked to impose compulsory union-shop conditions by statute.* The bill before us merely permits the collective-bargaining pro-

cess to operate in that field. *It merely removes an existing statutory prohibition* against the negotiation of union-shop agreements if the carrier and the representatives of its employees are able to reach a meeting of the minds." (Emphasis added.)

From these quotations it will be seen that proponents of the amendment in both the House and the Senate clearly asserted that no compulsion was provided in the Bill.

This Court, in *Railway Employees' Department, A. F. L.* v. *Hanson,* 351 U. S. 225, has explicity dedeclared that the language of the 1951 Amendment is permissive and not mandatory. It said (page 231):

> "The union shop provision of the Railway Labor Act is only permissive. Congress has not compelled nor required carriers and employees to enter into union shop agreements. . . ."

The 1951 Amendment to the Railway Labor Act, being permissive only and not mandatory, does not render unlawful the agreement of the parties that the non-union employees in the shop crafts employed on this Railroad would not be required to maintain union membership, under any agreement then in effect or that might thereafter be in effect between the Union and the Railroad, as a condition precedent to employment benefits.

The validity of the agreement and the "Judgment, Decree and Injunction" as of the time they were made and entered in 1945 is certainly not subject to review

now. It is elementary that a motion under Rule 60(b) of the Federal Rules of Civil Procedure to vacate or modify a judgment or decree cannot be used as a substitute for appellate review of the original consent decree. *Berryhill* v. *United States*, 199 F. 2d 217 (C. A. 6); *Morse-Starrett Products Company* v. *Steccone, supra; Title* v. *United States, supra.* This Court, in *United States* v. *Swift & Company, supra,* stated (page 119):

> "There is need to keep in mind steadily the limits of inquiry proper to the case before us. We are not framing a decree. We are asking ourselves whether anything has happened that will justify us now in changing a decree. The injunction, whether right or wrong, is not subject to impeachment in its application to the conditions that existed at its making. We are not at liberty to reverse under the guise of readjusting."

Thus, the sole question here is one of determining the effect, if any, of the 1951 Amendment upon the previous agreement and consent decree. The agreement of the parties was lawful when made in 1945 prior to the amendment and it remains lawful today, notwithstanding the amendment. As the District Court very correctly stated (R. 79-80):

> "The railroad and unions went further to provide by their agreement that no such requirement of union membership should thereafter be in effect in any bargaining agreement in accordance with the provisions of the Railway Labor Act. The 1951 amendment to the Act did no more than make

> negotiations for a union shop permissive, *Railway Employees' Dept.* v. *Hanson, supra.* The amendment did not nullify the agreement or the injunction. It did not prohibit an agreement between the railroad and the unions that a union shop should not exist. Hence, the Court leaves the parties as they agreed to be and to remain."

Today, under the Railway Labor Act, as amended in 1951, the parties could enter into precisely the same agreed settlement of the same type of case as they did in 1945. To illustrate, let us suppose that the complaint filed in this suit in 1945 had been filed today and that hostile discrimination was being practiced by the Unions and their members against non-union employees (the open shop being in effect) because of their non-union membership. As stated by this Court in *Brotherhood of Railroad Trainmen* v. *Howard,* 343 U. S. 768, 774:

> "Bargaining agents who enjoy the advantages of the Railway Labor Act's provisions must execute their trust without lawless invasions of the rights of other workers . . ."

Under the Railway Labor Act, in the absence of a union shop the plaintiffs today would be entitled to the same relief to which the plaintiffs in the present case were entitled. *Steele* v. *Louisville & N. R. Co., supra.* Under such supposed state of facts, in order to effect a settlement, the parties today could lawfully agree that union membership would not be required as a condition precedent to employment benefits. There-

fore, it is obvious that the 1951 Amendment has not changed the equities which prompted the Court to enter the decree in 1945 and that the Petitioners are not entitled to the modification *solely* because of this amendment. A mere change of law is not always sufficient to warrant modification of a judgment granting an injunction; and certainly the specific change of law involved in this case does not warrant—much less does it compel—the modification which Petitioners seek.

Some of the cases relied upon by the Petitioners have been shown, in earlier parts of this brief, not to support their position. We proceed now to show that other cases cited by them also fail to support it.

In *Coca-Cola Company* v. *Standard Bottling Company,* 138 F. 2d 788 (C. A. 10th), a consent decree had been entered against the Standard Bottling Company enjoining it from selling any products having in their names the word "Cola" or "Coca-Cola" or similar words. During the pendency of the injunction, a number of other companies in the territory began selling similar products, such as Pepsi-Cola, Cleo-Cola and Royal Crown Cola. In view of this change in the *factual* situation, a modification was made in the injunction. In the present case, however, there is no change in the factual situation concerning the discrimination at which the injunction was directed.

Chrysler Corporation v. *United States,* 316 U. S. 556, simply holds that where a decree is impossible of performance due to circumstances beyond the control of the parties, the injunction *may* be modified. The ruling in that case, moreover, has been limited by the

later case of *Ford Motor Company* v. *United States*, 335 U. S. 303, wherein this Court refused to make a "mechanical application" of the *Chrysler* case and stated that the moving party had the burden of showing good cause why a court of equity should grant relief from a carefully drawn decree ending years of litigation. Thus, the decisions below are clearly not contrary to the law contained in these two cases.

In *State of Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U. S. 421, the basis for the subsequent dissolution of the injunction was merely a declaration by Congress that the bridge in question did not interfere with navigation, a fact which was as true at the time the injunction was issued as it was at the time it was dissolved. The injunction was dissolved, not because of a change in the statutory law in existence at the time the injunction was entered; rather, the subsequent Act of Congress was more in the nature of a declaration of a fact. Congress in effect said that, as far as it was concerned, the injunction should not have issued in the first place.

Western Union Telegraph Company v. *International Brotherhood of Electrical Workers*, 133 F. 2d 955 (C. A. 7th), is not in conflict with the decisions below. In that case, it was contended that the change of law made by enactment of the Norris-LaGuardia Act (29 U. S. C. Sec. 101, *et seq.*) justified the modification of the injunction against the labor unions. This case will be dealt with more completely in a subsequent portion of this brief.[1] It is sufficient at this time to point out

[1]Please see pp. 52-54, *infra*.

that the modification sought was not granted, and that the Seventh Circuit, at page 959, was influenced by the admonition of this Court in the *Swift* case, *supra,* to the effect that "nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead the Court to change what was decreed after years of litigation."

The decisions of the lower courts in this case are not contrary to *Ladner* v. *Siegel,* 298 Pa. 487, 148 A. 699 (which was cited by this Court in the *Swift* case), because the *Ladner* case did not involve the question of a change of law alone but involved also the question of a change in the *factual* situation between the date of the issuance of the original decree and the motion for modification. The problem in that case involved the location of a garage and whether it could be used as a public garage. The surrounding property had, in fact, changed from residential to commercial during the interim between the issuance of the injunction and the motion for modification. The Pennsylvania Court thus set forth succinctly the formula for modification of an injunction (148 A. 702):

> "The modification of a decree in a preventive injunction is inherent in the court which granted it, and may be made, (a) if, in its discretion judicially exercised, it believes the ends of justice would be served by a modification, *and* (b) where the law, common or statutory, has changed, been modified or extended, *and* (c) ***where there is a change in the controlling facts on which the injunction rested.***" (Emphasis added.)

The Court in the *Ladner* case did not approve the modification of the injunction solely because of the change of law. The Court also considered a change in the controlling factual background, namely, that the residential district, in which so many apartment houses, hotels, schools and clubs were then located, was no longer so exclusively residential as to make a storage garage a nuisance *per se*. The Court, referring to the above formula, stated at page 702.

> "It becomes apparent that the second *and third* reasons amply justify a modification of the decree, if there is nothing else to prevent it." (Emphasis added.)

The injunction issued in *Santa Rita Oil Company* v. *State Board of Equalization,* 112 Mont. 359, 116 P. 2d 1012, 136 A. L. R. 757, involved a decree of the Montana Court which enjoined the levy and collection of state taxes on oil and gas production under a lease of trust patent Indian land, upon the *sole* ground that in extracting the oil and gas the plaintiff was an instrumentality of the federal government and thus immune from taxation by the state. The injunction was based *solely* upon earlier decisions of this Court holding that such taxes constituted an interference with governmental functions. Subsequently, this Court overruled its earlier decisions and held that such taxes did not, under the circumstances, constitute an interference with governmental functions, which, of course, removed the *entire* foundation of the injunction. The injunction in the present case, in contrast, was bot-

tomed upon the discrimination practiced against the non-union employees, and such discrimination remains unlawful. Also forming the basis of the injunction in the present case is the underlying agreement of the parties prohibiting provisions in any future collective bargaining agreement which would require the employee Respondents to join a union.

Analysis of the case of *National Electric Service Corporation* v. *District 50, United Mine Workers*, 279 S. W. 2d 808 (Ky.), will show that, as in the *Santa Rita* case, the injunction had been based *solely* on the law as it then existed, and this Court, by a subsequent decision, changed the law. Even in those circumstances, the Court of Appeals of Kentucky held that modification of the injunction was not a matter of absolute right but lay in the discretion of the trial Court.

Other decisions of equal import have held that for an injunction to be modified because of a change of law, the situation must have changed with respect to a *fact* which was the basis of, and material to, the original injunction. In *Degenhart* v. *Harford*, 59 Ohio App. 552, 18 N. E. 2d 990, an injunction had been issued restraining the defendant from maintaining and operating a funeral home in a residential district upon the grounds—

(1) that it was a nuisance; and

(2) that it was forbidden by city ordinance.

Subsequent to the entry of the injunction, the city modified its zoning ordinance so as to permit the main-

tenance and operation of a funeral home within a residential district. The Court refused modification of the injunction and held that the fact that the city had subsequently changed the law did not justify the modification. This ruling was based on the sound ground that the original ordinance was not the basis for the conclusion that the maintenance and operation of the home constituted a nuisance. By the same token, the injunction in this case was rested on the ground that there was hostile discrimination practiced by the defendants in relation to the non-union employees. Also forming a basis of the injunction in the present case is the underlying agreement of the parties. A change of law such as the 1951 Amendment, being permissive only, does not, by itself, compel the modification of the injunction.

Another case in point is *Sunbeam Corporation* v. *Charles Appliances*, 119 F. Supp. 492 (S.D., N.Y.). There, the rule is laid down as follows (page 494):

> ". . . The mere change in decisional law upon which a permanent injunction was granted, in and of itself, will not support the opening or modification of the decree. The circumstances of the parties must so have changed as to make it equitable to do so. This indispensable ingredient is lacking in the case at bar."

The same rule should be applied here, for the moving Unions have sought modification of the consent decree upon the ground of a change of law only, a change which we have shown is permissive only and

not mandatory. This, in and of itself, considering all of the other relevant facts and circumstances of this case, is not enough. Please see, also, *Morse-Starrett Products Company* v. *Steccone*, 205 F. 2d 244 (C. A. 9th).

As stated in *United States* v. *Radio Corporation of America*, 46 F. Supp. 654, 656 (D., Del.), while a Court may have power to modify injunctions upon a proper showing of a change of circumstances, such modification *must be consistent with the purpose of the original injunction and calculated to effectuate and not thwart its basic purpose. United States* v. *International Harvester Company*, 274 U. S. 693, 702; *Chrysler Corporation* v. *United States*, 316 U. S. 556. The modification here sought would thwart the basic purpose of the original decree and confirm the Unions and their members in the discrimination which the decree was designed to dispel. The Petitioners' suggestion to the District Court (R. 79) that the decree could be so modified as to incorporate protection for all activities other than the negotiation of a union-shop agreement is in reality a suggestion that a new decree be entered; for the negotiation of a union-shop agreement would obliterate the entire class the present decree was designed to protect. Such a new decree, to be effective, would require judicial supervision of the Unions' affairs, a task which the District Court properly declined to undertake in the circumstances proven (R. 79).

D. The Motion to Modify the Injunction, on the Sole Ground of This Change of Law, Was Properly Denied Because the Uncontradicted Proof Establishes That the Moving Party Has Unclean Hands.

The Petitioners here have sought relief by a motion filed pursuant to Rule 60(b)(5) of the Federal Rules of Civil Procedure, which prescribes a procedure for relief when ". . . it is no longer equitable that the judgment should have prospective application; . . ." The Unions have come into equity seeking equitable relief in this proceeding for modification. The maxim that one who seeks equity must come with clean hands is not a trite expression. On the contrary, the principle to which the maxim gives expression retains its significance and is firmly a part of our jurisprudence. Speaking of this maxim in *Precision Instrument Manufacturing Company* v. *Automotive Maintenance Machinery Company*, 324 U. S. 806, this Court stated (page 814):

> "This maxim is far more than a mere banality. It is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant. That doctrine is rooted in the historical concept of court of equity as a vehicle for affirmatively enforcing the requirements of conscience and good faith. This presupposes a refusal on its part to be 'the abettor of iniquity.' *Bein* v. *Heath*, 6 How. (U. S.) 228, 247. Thus while 'equity does not demand that its

suitors shall have led blameless lives,' *Loughran* v. *Loughran*, 292 U. S. 216, 229, as to other matters, it does require that they shall have acted fairly and without fraud or deceit as to the controversy in issue. *Keystone Driller Co.* v. *General Excavator Co.*, 290 U. S. 240, 245; *Johnson* v. *Yellow Cab Transit Co.*, 321 U. S. 383, 387; 2 Pomeroy, Equity Jurisprudence (5th Ed.) Secs. 397-399.

. . . . . .

"Accordingly, one's misconduct need not necessarily have been of such a nature as to be punishable as a crime or as to justify legal proceedings of any character. Any willful act concerning the cause of action which rightfully can be said to transgress equitable standards of conduct is sufficient cause for the invocation of the maxim by the chancellor."

Petitioners have cited the case of *Western Union Telegraph Company* v. *International Brotherhood of Electrical Workers*, 133 F. 2d 955 (C. A. 7th). The case, however, does not support the modification here. On the contrary, it forcefully emphasizes additional grounds for denying the present motion.

In that case an injunction had issued in 1924 enjoining the Unions from interfering with the Company's business by means of a secondary boycott, the object of the Unions being to bring about the unionization of Western Union's employees. At the time of the entry of the injunction in 1924, the trial court believed that the Unions' activities involved in the case were prohibited by the Sherman Act. Subsequent to the entry of the decree, this Court held that such

activities as were involved were not violative of the Sherman Act; and the Norris-LaGuardia Act was passed. In 1941 the Unions filed a petition for modification based upon the change of law, the Unions contending that the Norris-LaGuardia Act nullified the 1924 decree. The District Court, being of the opinion that the Norris-LaGuardia Act had legalized many of the acts prohibited by the decree, "entered an order modifying the decree to conform with the Act." The Circuit Court reversed, stating (page 959):

> "In the consideration of this question it is well to remember the admonition of the court in the Swift case, supra, 286 U. S. 119, 52 S. Ct. 460, 76 L. Ed. 999, that nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead the court to change what was decreed after years of litigation. In this connection we are permitted to examine and judicially notice the proceedings formerly had by the parties, De Bearn v. Safe Deposit & Trust Co., 233 U. S. 24, 34 S. Ct. 584, 58 L. Ed. 833. From these records it appears that there was evidence tending to prove that appellees' agents resorted to destruction of appellant's property and made threats of violence upon appellant's employees. It is possible that the appellees have mended their ways and have turned over a new leaf and that such a showing may be made, but it has not been made by the record in the instant case; consequently, we believe that justice would be better served if the cause were remanded to the District Court to inquire into the good faith of the appellees and whether they come into court with clean hands.

"The order is reversed, and the cause is remanded with directions to proceed in accordance with this opinion."

There are additional reasons for denying the modification here sought which were not present in the *Western Union* case, *supra*: The present case also involves consideration of the *agreed settlement* of the case made by the parties. Also, in the present case the non-union employees for whose protection the decree was entered made an *affirmative and uncontradicted showing* that there was no change in the attitude of hostility manifested toward them by Petitioners' members; that efforts are still being made by the Unions' members to intimidate them and force them from their jobs and to cause them to be by-passed when promotions are made and work is assigned. The present record (R. 81-137) is replete with such evidence and has been dealt with in the earlier portions of this brief.

The discrimination by the Unions' members against the non-union employees protected by this injunction *remains a real and present threat to the livelihood of the latter.* Clearly, the Petitioners have sought equitable relief with unclean hands.

VIII. CONCLUSION.

For the foregoing reasons the Respondent, Louisville and Nashville Railroad Company, submits that the decisions of the District Court and the Court of Appeals are correct and should be affirmed.

Respectfully submitted,

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